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No. 681

In the Supreme Court of the United States

October Term, 1972

CHARLES PUGH

FRANKLIN G. FESSENDEN ET AL.

ON CERTIORARI FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT

FOR THE UNITED STATES OF AMERICA COUNSEL

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

CHARLES PONZI	} No. 631.
v.	
FRANKLIN G. FESSENDEN ET AL.	

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE UNITED STATES AS AMICUS CURIÆ.

The Solicitor General, on behalf of the United States, moves the Court to permit the Government to file this brief as *amicus curiæ* in the above-entitled case.

On September 11, 1920, twenty-two indictments were returned against Ponzi in the Superior Court for Suffolk County, Mass., charging him with certain larcenies, with being an accessory before the fact to certain larcenies, and with conspiracy to commit larceny.

On November 30, 1920, Ponzi pleaded guilty in the District Court of the United States for the District of Massachusetts to the first count of an indictment charging violation of section 215, Penal Code, namely, for using the mails in connection with a scheme to defraud. He was sentenced by said court to im-

prisonment for five years in the House of Correction at Plymouth, Mass.

On April 21, 1921, the said Superior Court for Suffolk County issued a writ directing Blake, the master of said House of Correction, to bring said Ponzi forthwith before said court and from day to day thereafter for trial upon the aforesaid twenty-two indictments, but to hold Ponzi at all times in his (Blake's) custody as an officer of the United States subject to the sentence imposed by the United States District Court. Blake made return to said writ that he held Ponzi pursuant to process of the United States and prayed that said writ might be dismissed.

By direction of the Attorney General of the United States, an Assistant Attorney General stated in open court that the United States had no objection to the issue of the writ, or to compliance therewith by Blake, or to the production of Ponzi for trial in the Superior Court.

Blake refused to produce Ponzi in the Superior Court, which adjudged him in contempt, and committed him to custody. He thereupon filed a petition in the United States District Court for a writ of habeas corpus, which was dismissed by that court on April 27, 1921. Blake did not appeal, but thereafter produced Ponzi in the said Superior Court pursuant to the writ issued by said court.

On May 23, 1921, Ponzi filed in the said District Court a petition for a writ of habeas corpus alleging in substance that the said Superior Court had no jurisdiction to try him when produced by Blake for trial

upon the writ above described. Ponzi's petition was denied by said District Court on May 24, 1921; he appealed to the Circuit Court of Appeals, and that court has certified to this Court the following question:

May a prisoner, with the consent of the Attorney General, while serving a sentence imposed by a District Court of the United States, be lawfully taken on a writ of habeas corpus, directed to the master of the House of Correction, who, as Federal agent under a mittimus issued out of said District Court, has custody of such prisoner, into a State court, in the custody of said master and there put to trial upon indictments there pending against him?

Ponzi makes two contentions which directly affect the United States:

(1) That to try him in the State court for offenses against the State while he is confined upon a Federal sentence invades the rights of the United States.

(2) That the Attorney General has no authority to appear in open court and state that the United States does not object to production of Ponzi for trial in the manner above set forth.

The purpose of this brief is to state the position of the United States in respect of these contentions.

I.

Ponzi is the prisoner of the United States. He has no authority to speak for the United States. Any right of the United States must be asserted by one

who is authorized by law to speak for the United States.

II.

The Attorney General is the proper officer to assert on behalf of the United States any right or interest of the United States. Revised Statutes, sec. 367, provides:

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or District in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States.

III.

The United States does not perceive that any right of the United States is violated by production of Ponzi before the State court for trial in the custody of the Federal agent who holds him pursuant to the mittimus of the United States District Court. The State court does not question the right of the United States to hold Ponzi for the term of his sentence. The writ issued by that court expressly recognizes the superior right of the United States to the custody of Ponzi. Any sentence which that court can impose can not take effect until the expiration of the Federal sentence. It is a common practice to permit the production of Federal prisoners to testify before State courts and to cause State prisoners to appear before Federal courts to testify. This practice has not been

deemed to interfere with the right to hold the prisoner in custody pursuant to his sentence or to infringe upon the execution of the mittimus under which he is held. It is not perceived wherein the production of a prisoner before a court in order that his guilt or innocence of another offense may be determined upon testimony given by himself or others interferes to any greater extent with the right to hold him in custody or with the execution of the mittimus. This was the view expressed by the United States District Court when it dismissed Blake's petition for a writ of habeas corpus. (See *In re Blake*, printed as "Appendix A" in the brief for Franklin G. Fessenden.)

In thus stating the position of the Federal Government, the Solicitor General takes no position and expresses no opinion as to whether under the laws of Massachusetts the said Ponzi can or should be put on trial for an offense against the laws of that State while a prisoner of the United States. This the Solicitor General regards as a question for the courts of Massachusetts to determine. The United States takes the position above outlined in the spirit of comity, which should mark the Nation and the States in the administration of justice, especially in the enforcement of the laws with respect to crimes.

JAMES M. BECK,
Solicitor General.

W. MARVIN SMITH,
Assistant Attorney.

MARCH, 1922.